



INTERNATIONAL BOUNDARY AND WATER COMMISSION
UNITED STATES AND MEXICO

May 15, 2013

OFFICE OF THE COMMISSIONER
UNITED STATES SECTION

The Honorable Carlos Rubinstein
Commissioner
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Allocation of water at Fort Quitman

Dear Commissioner Rubinstein:

In follow up to your inquiry on behalf of the Texas Commission on Environmental Quality, the Lower Rio Grande Valley Water District Managers' Association, Rio Grande Regional Water Authority, Watermaster Advisory Committee, and the Rio Grande Regional Water Planning Group regarding the national ownership of waters of the Rio Grande under the 1944 Water Treaty, and your letter of May 13, 2013, I am pleased to provide the following information. As you know the U.S. Section responded to the Texas Commission on Environmental Quality in 2008 citing evidence from the historical record to support the International Boundary and Water Commission's practice of accounting for the waters of the Rio Grande that pass the Fort Quitman gage 50-50 between the United States and Mexico. In 2012, you wrote to me citing additional historical sources you had reviewed regarding this matter. I instructed my staff to review the new information cited in your letter and to look at this from a completely neutral prospective and to conduct any additional research that would further clarify the matter. I am pleased to summarize in this letter the findings and conclusions from that research.

As I will discuss in greater detail in this letter, I am persuaded by the documents from the historical record that the International Boundary and Water Commission has properly accounted for the national ownership of waters at Fort Quitman in accordance with the longstanding Commission practice, established in 1955, of crediting each country with one-half of the measured inflow at the Fort Quitman gaging station on the main channel of the Rio Grande. The reasons for doing so are clear and are consistent with the 1944 Water Treaty.

The plain language of the 1944 Water Treaty throughout that document addresses the utilization of waters of the Rio Grande **"from"** Fort Quitman, Texas to the Gulf of Mexico or **"between"** Fort Quitman and the Gulf (not **"below"** Fort Quitman as your interpretation suggests). Specifically, Article 4 states: "The waters of the Rio Grande (Rio Bravo) between Fort Quitman, Texas and the Gulf of Mexico are hereby allotted to the two countries in the following manner:" The article describes in detail how the waters of the Rio Grande and certain named tributaries are allotted between the two countries and also allots to the United States "One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam."

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In your letter, you argue that the lower Rio Grande users believed at the time the Rio Grande Compact was agreed to in 1938, that flows in the Rio Grande downstream of Fort Quitman belonged to them and that the 1944 Water Treaty was developed knowing full well that these users believed the 200,000 acre-feet passing Fort Quitman belonged to them.

Yet, as you know, the Rio Grande Compact does not contain any requirement for delivery of water to Fort Quitman. The text of the Compact itself states that the Compact is "with respect to the water of the Rio Grande above Fort Quitman, Texas." Even if the lower Rio Grande valley users in 1938 believed they would receive water at Fort Quitman, it is difficult to see how this belief could be considered to be binding upon the U.S. government in its subsequent treaty negotiations with Mexico. Additionally, prior to the 1944 Water Treaty (and after), Rio Grande flows in the reach between Fort Quitman and the Conchos River confluence were utilized on both sides of the border. As early as 1930, an appendix to the Report of the American Section of the International Water Commission acknowledged the rights of both countries to divert and utilize water of the Rio Grande below Fort Quitman, while specifying that waters down to Fort Quitman belong entirely to the United States.

Nor does the Rio Grande Compact specify delivery of water to Texas; however, it does specify delivery of water at the Colorado-New Mexico State Line and to the Rio Grande at San Marcial (near Elephant Butte Dam). At the time the Compact was being considered for ratification by the states, some interests in Texas expressed concern that the Compact lacked a requirement for delivery to the Texas state line. To compensate for this alleged lack of water delivery to Texas, some Texas water users requested 200,000 acre-feet per year of Rio Grande water below Fort Quitman. The controversy was resolved by Texas Rio Grande Compact Commissioner Frank Clayton (subsequently the Legal Advisor for the U.S. Section and a key drafter of the 1944 Water Treaty) who explained that the Compact did not require a delivery to Texas because Texas was already taken care of through the division of waters provided for in Reclamation's Rio Grande Project, which specified waters to be delivered to El Paso's irrigation district. After Clayton cleared up this misunderstanding, the Compact was ratified.

I stand by the U.S. Section's characterization of the testimony of Reclamation Commissioner Harry W. Bashore during the treaty ratification hearings in which he stated that the "approximately 200,000 acre-feet at Fort Quitman...becomes part of the amount which will be divided under this treaty." You argue that his statement should not be viewed as indicating that this volume would be divided 50-50 between the United States and Mexico. Yet, there is nothing in the treaty ratification record that supports your interpretation that these waters would be allotted 100% to the United States. Witness after witness referred to the Article 4 language allotting to the United States one-half of these flows. Even witnesses and written statements from the State of Texas in support of treaty ratification failed to assert that waters in the Rio Grande passing Fort Quitman are allotted entirely to the United States.

However, I do agree with you and the historical record does confirm that the United States position has always been that the United States may use 100% of the waters of the Rio Grande from the Mexican canal heading *to* Ft. Quitman in accordance with the Convention of 1906.

You also cite memoranda of the U.S. Section of the International Boundary and Water Commission from 1953 and 1955, which clearly express the understanding of the Commission that the waters of the Rio Grande passing Fort Quitman are allotted 50-50 between the two countries. However, you

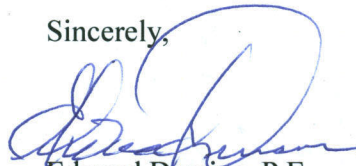
inaccurately state these are based on nothing more than the vague testimony of Commissioner Bashore. In fact, these memos are based on the significant experience of the personnel of the International Boundary and Water Commission and the Commission's technical advisors in performing studies, drafting treaty text, negotiating the treaty, and preparing supporting documentation and testimony for the treaty ratification hearings.

You also suggest that the Commission's handling of water accounting at Fort Quitman is unauthorized because it was never adopted as a Minute of the Commission approved by the two Governments. Yet, the Commission did sign various Minutes (182, 187, 207, and 210) approved by the Governments related to development of international storage reservoirs. In those Minutes, the Commissioners endorsed studies, reports, and analyses of river flows and national ownership of waters based on a view that the 200,000 acre-feet passing the Fort Quitman gage is considered water of the lower Rio Grande basin allotted by the 1944 Treaty or, more specifically, allotted 50-50 between the two countries. Joint Reports adopted by Minutes approved by the two Governments are enforceable agreements.

I would also like to point out that application of the 1944 Water Treaty is entrusted to the International Boundary and Water Commission, United States and Mexico. The two Sections of the Commission have been in agreement for more than a half-century regarding the application of the treaty provision in question. This application is also consistent with the technical report submitted in 1945 for Mexico's treaty ratification process. Moreover, to account for this water, in a different manner would require the concurrence of the Mexican Section, something that seems entirely unlikely.

Thank you for sharing your views and research with the U.S. Section of the International Boundary and Water Commission. I look forward to continuing the productive dialogue and engagement between the State of Texas and the U.S. Section on issues associated with the 1944 Water Treaty.

Sincerely,



Edward Drusina, P.E.
Commissioner

cc: Mr. Bryan Shaw, Chairman TCEQ
Mr. Toby Baker, Commissioner, TCEQ
Mr. Zak Covar, Executive Director, TCEQ
Mr. Todd Staples, Commissioner, Texas Department of Agriculture
Ms. Roberta Jacobson, Asst Secretary, Bureau of Western Hemisphere Affairs, U.S. Dept of State
Mr. Wayne Halbert, President, Lower Rio Grande Valley Water District Manager's Association
Mr. Joe Barrera III, Executive Director, Rio Grande Regional Water Authority
Rio Grande Watermaster Advisory Committee
Mr. Glenn Jarvis, Chairman, Rio Grande Regional Water Planning Group